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**THE SUPREME COURT OF ARIZONA**

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| **IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,**<br><br>**Lisa M. Aubuchon,**<br>**State Bar #013141**<br><br>**Appellant.** | **No. PDJ 2011-9002**<br><br>**APPELLANT'S OPENING BRIEF** |

**INTRODUCTION**

Respondent Lisa Aubuchon asks that this Court reverse the Disbarment Order entered by the Disciplinary Panel. Appellant is an attorney who has been in governmental employment for over 20 years with no disciplinary history, numerous promotions and exceptional evaluations. The decision by this Court will impact attorneys across the country and it is requested that Appellant will receive a truly impartial review of all of the evidence that ultimately shows a finding contrary to that found. The Panel was required to make findings based on clear and convincing evidence, not on speculation and conjecture. Instead, the pontification that occurred was based on two themes that are the foundation for the entire 247 page Order- that Appellant acted

for political reasons and that she knew the filings she made were false. This foundation is built on an unstable and fabricated base that falls as soon as any fair assessment is made. The acts of Appellant must be proved and judged on its own. She cannot be judged as a part of a group. The alleged acts and omissions of Mr. Thomas cannot be imputed to Lisa Aubuchon. The Order must be supported with clear and convincing evidence that proves each and every element of each and every ethical violation charged against Appellant. In an effort to destroy Andrew Thomas, the powers that be decided to take down Appellant too by lumping everything allegedly done by Thomas as proof of Appellant's conduct. This attack is not right. This Court must right the wrong that has occurred to Appellant. The Order was 247 pages yet Appellant has 30 pages to respond in her Brief, an impossible task and Appellant has requested an extension of the page limit to 60 pages in an attempt to still address just the main issues. The details of her argument are contained in Appellant's Closing argument and this Court is referred to that document, R. 417. Appellant asks that this Court thoroughly review the record as to the issues presented.

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## STATEMENT OF THE CASE AND FACTS

This Appeal is from the Disbarment Order of the Disciplinary Panel entered on April 10, 2012. R.428. This Court has jurisdiction pursuant to Rule 59 of the Arizona Rules of Supreme Court. The proceedings in this matter began from an unheard of referral to Justice Rebecca Berch from John Phelps with the Arizona State Bar. The case arose from Bar Complaints investigated by attorneys who have been labeled "Independent Bar Counsel" (hereinafter referred to as bar counsel). The names of the individuals making the bar complaints, and the specific complaints themselves, have never been disclosed. It was not based on any bar complaint known to Appellant other than a complaint by David Smith, one of the people Appellant filed a cause of action against in court, related to alleged conflict issues. R. 470. Despite John Gleason and staff not being attorneys licensed by the Arizona Supreme Court, Justice Berch appointed him to act as the bar prosecutor.R.9.

John Gleason and staff embarked on an investigation, interviewing over 100 people yet, as admitted by bar counsel, never providing one recorded interview, one note from a witness interview nor a list of those interviewed. No exculpatory information was provided to Appellant. John Gleason continued to use the name "Independent Bar Counsel" despite him working with the Arizona State Bar, the Arizona Attorney General's Office,

the United State's Attorney's Office, and Maricopa County entities to obtain information and access to people. During a six month screening investigation, bar counsel provided Appellant with allegations to respond to and despite numerous requests as well as attempts to ask this Court for relief, no facts or bar complaints were ever provided to Appellant to respond to.R.222. Despite knowing Appellant's counsel was fired by Maricopa County Attorney's Office after receiving Appellant's partial responses to the allegations, bar counsel filed a request with the hearing panelist and obtained a probable cause determination under the old bar disciplinary process.R.1. After obtaining this finding, bar counsel waited several months to file formal charges and avoided the old process.R.1. This action resulted in Appellant never being able to present her case to the panel of 8-10 people which she would have been able to do under the old or new process.

William O'Neil was the trial court judge who entered a stay order in the Gary Donahoe criminal prosecution after this Court denied the stay.R.26. In violation of the judicial canons, he remained as the Presiding Disciplinary Judge in this matter.R.26. Even after a request to have him recuse himself and bringing to light his holding motions to disqualify the Arizona Attorney General's Office on an investigation that ultimately led to a finding of unethical conduct by the Panel,

he remained.R.26. Subsequent to the decision of the disciplinary panel, a concerned citizen came forth with direct evidence of bias, something unknown to Appellant that is corroborated by the failure to recuse himself. See Special Action and related pleadings filed in this Court, CV-12-0159 SA. The 275 page Order on its face and the actions in waiting to deny a stay until the last hour also show the actions and opinions of Judge O'Neil. R.452.

Appellant's counsel was precluded from bringing in evidence of the guilt of Donald Stapley Jr. and Mary Rose Wilcox despite the allegations that she did things solely for political purposes.R.470 and as will be discussed below, the allegations were vague, violated due process and the findings and the conclusions of the panel are not supported by law or fact.

Appellant filed this Appeal and request for stay of the order but was denied a stay of the Order on the last possible hour by the panel despite her request pursuant to Rule 58 being filed a month prior.R.430. Despite no prior allegation of "danger to the community" and no interim suspension or supervision sought as to the allegations occurring now three years ago, panel denied the stay.R.452.

## STATEMENT OF THE ISSUES FOR REVIEW

**I. Appellant's Constitutional Rights were violated throughout the Disciplinary Process;**

**II. The Panel's Order was based on erroneous legal conclusions;**

**III. The Panel's factual findings were clearly erroneous.**

## ARGUMENT

**I. Appellant's Constitutional Rights were violated throughout the Disciplinary Process.**

Appellant is entitled to due process in this disciplinary proceeding. *In the Matter of John Ruffalo, Jr., Petitioner*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

**A. Screening Investigation.** John Gleason was assigned to investigate not a bar complaint but attorneys. See Administrative Order 2010-41, entered March 23, 2010. This Court can take judicial notice that bar complaints have always been required in the past to being an "investigation" based on conduct, not as to attorneys in general. This Order was done solely by Justice Berch and she allowed attorneys not authorized to practice law to become the bar prosecutors, apparently free from the constraints placed on attorneys admitted before this Court. While Appellant and her attorneys attempted to get this Court to review what they believed to be an illegal initiation of the process, that attempt became a basis of an ethical violation against Appellant despite her simply attempting to address what she believes was a violation of her procedural due process rights. Exh. 230 and Exh. 513.

In addition, the investigation was illegally initiated any John Phelps. He did not have the authority to do so under Rule 53. Exh. 224.

In addition to bar counsel practicing without a license, he and his staff acted as investigators in the screening process. However, despite demands for disclosure of that investigation, bar counsel refused to provide any claiming it was "work product." Ironically, all of Appellant's work product was released to anyone who requested it, other than to Appellant, by those including the Maricopa County Attorney's Office. In fact, Appellant's hard drive was copied and given to the FBI yet she was never provided with her information that was exculpatory. For example, Appellant did a month's worth of research prior to filing the RICO action yet she was denied access to all of her work by the County Attorney and bar counsel failed to disclose the exculpatory information received by them from the County Attorney. All of the hours of research and emails would have showed clearly the investigation done by Appellant that is required under the ethical rules before filing cases and pleadings.

In this matter, bar counsel was allowed to hide the evidence that they obtained through the investigation under the guise of work product. This failure to produce interviews, names of witnesses and documents that they learned of in the screening investigation violated appellant's rights to a fair trial.

When Appellant attempted to cooperate with the bar counsel in the screening investigation, bar counsel refused to provide

any facts to Appellant to respond to. For example, as set forth in Exh. 222, letter from John Gleason, they demanded she respond to "It is alleged that. . ." No facts alleged, not evidence given simply an allegation to respond to. As shown in the trial, there was no evidence that Appellant was ever aware of any prior investigation other than simply Mark Goldman looking at some records he obtained from another investigation. Despite bar counsel manipulating this "notebook" given to MCSO by Sally Wells and a notebook that on its face was not the one seen by Appellant as it had documents from after the alleged dates, no testimony existed to show Appellant knew of any prior meetings or investigations. How can she respond to an allegation such as this when she has no idea what facts are relied upon?

**B. Manipulation of the Process.** Bar counsel filed the probable cause petition under the old process and waited until the new process came into play so that he could avoid having the probable cause panel or the Commission who would hear the evidence. This action is an ex post facto violation as well as violates Appellant's right to equal protection and procedural due process. The highest court in the State of Arizona should be concerned about justice not a manipulation of the system.

The disciplinary process was in place for years and was changed, ironically, in response to complaints about the process used to try and get Andrew Thomas the first go around. This Court brought in John Gleason, the very same John Gleason that is the "independent bar counsel" in this matter to help "fix" the system. The old system had safeguards in place to allow presentation of the evidence to a large panel, eight or ten

individuals. The new system also had the same safeguard in place but that panel was placed as the probable cause panel to try and address cases at the beginning presumably to avoid simply one person deciding probable cause.

It is a clear violation of the ex post facto clause in this quasi criminal proceeding to allow a process that is adopted after conduct occurred and after a complaint has been filed to be changed and altered significantly in the middle. Bar counsel knew that their actions in waiting to file the formal complaint meant they could get before Judge O'Neil and his hand selected panel, knowing he had already ruled in Donahoe's favor and avoid the 8-10 person panel. This gamesmanship with a person's livelihood should not be allowed by the highest court in the land. An addition to it being an ex post facto violation, appellant's equal protection and due process rights were violated as she is being treated differently than other attorneys who were went through discipline process prior to her matter as well as attorneys who were went through the process after her matter.

**C. Judge O'Neil.** Appellant's Right to a Fair Trial was denied based on Judge O'Neil's conflicts of interest. The Presiding Judge tried to control the defenses presented as evidenced in part by sidebars, cautioned Appellant's counsel several times during the proceedings that: "We (the Panel) get it and it is not necessary to spell everything out." R. 470, as to one example, see R. 417 closing argument as stated by counsel. The panel's order is peppered with conclusory statements about Appellant's morally bankrupt actions despite no

facts to support the conclusions. The Order even contradicts itself repeatedly, for example claiming Appellant started an investigation then proceeded without an investigation relating to Stapley. As R. 470 illustrates in the October 11 sidebar, Judge O'Neil had some predisposed belief that if the MCSO officers in this matter felt the process in investigating these matters was out of the ordinary, Appellant must have been acting unethically. This conclusion or even inference is completely unsupported and contrary to well established law where prosecutors can and do act regularly to assist law enforcement in investigations, even directing them. It appears there was some mistaken belief that attorneys acting as part of a joint task force such as MACE was unethical. There is a long line of cases distinguishing between absolute and qualified immunity showing a prosecutor can and is involved in investigations. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). Corruption investigations where prosecutors review evidence with police and work to address the issues are common. See http://www.nytimes.com/2011/05/23/nyregion/ny-attorney-general-granted-power-in-corruption-cases.html?pagewanted=all.

**i. Recusal as to Donahoe decisions**

As explained in the Informal Motion to have Judge O'Neil recuse himself, R. he was not permitted by the judicial canons to hear the matter. He had already made decisions on the merits of the very charges he was considering in this case- whether there was a conflict of interest in prosecuting Gary Donahoe. As is clear in the 247 page Order, he failed to acknowledge his

role in the stay, an issue that is extremely important and that shows his bias and prejudice. For example, he concluded with the panel that Appellant used an out of the ordinary process in charging Gary Donahoe to avoid a probable cause finding by a magistrate. Despite there being absolutely no evidence presented of that, something this Court could take judicial notice is false given the procedures in place in Maricopa County, he knew from his assignment over the case that he would be determining probable cause. He never had to make that finding because he entered a stay on the Gary Donahoe matter, preventing the Grand Jury from voting on the draft indictment they requested. He also knew that despite the panel's false "legal conclusion" that an "end inquiry" meant no other entity could proceed, the instructions he referred to in the Donahoe grand jury proceeding did not support the panel's conclusion as to their intent. Judge O'Neil failed to acknowledge the instructions from the grand jury that they were not to request a draft indictment unless they felt there was evidence and that they should not end inquiry if they have requested a draft indictment. These instructions as well as Appellant's request that they return the case for assignment to another prosecutor directly contradict the unsupported conclusions that there was no evidence to proceed in the bug sweep and court tower cover up grand jury. In fact, Daisy Flores, the victim of the count against Appellant agreed with Appellant that it was not clear what the grand jury intended.

The fact that Judge O'Neil had been directly involved with stopping the Gary Donahoe prosecution from moving forward after

hearing argument in the lower court from Appellant herself is in direct violation of the judicial canons and resulted in Appellant not having an unbiased judicial officer as evidenced by his failure to disclose his actions to the panel, including the information below.

**ii. Recusal as to grand jury matters.** Also as stated in the Motion for recusal, Judge O'Neil was assigned by Justice Ruth McGregor to the grand jury investigation by the Arizona Attorney General's Office into Appellant's conduct relating to the statute of limitations on the Stapley misdemeanors. Judge O'Neil refused to rule on emergency motions in the trial court filed by Appellant, sitting on those motions while applying for the job he has now. These motions he was sitting on are directly related to findings he made in this disciplinary process. Not only does this violate the judicial canons, it violates Appellant's right to a fair and unbiased judicial officer.

**iii. Affidavit and personal bias**

When Judge O'Neil finally unsealed the Motion for informal Recusal, he tried to justify his actions in part by claiming Appellant did not file for a Change of Judge for Cause. The judicial canons required recusal, Appellant should not have had to file a Change of Judge for Cause but it was not until after the proceedings that Appellant was approached by someone with direct evidence of Judge O'Neil's personal hostility towards Appellant. That affidavit was attached to Appellant's Reply to the Special Action seeking a stay. Appellant not aware of Dixon evidence until after the proceedings therefore she could not

have produced it. The affidavit is corroboration of why Judge O'Neil failed to recuse himself and these reasons alone warrant a remand of the case. A judge that is prejudiced against a party should not sit on a matter- goes to the very heart of our system of justice- everyone, including Appellant, is entitled to a fair day in court. *In the Matter of John Ruffalo, Jr., Petitioner*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

Had Appellant had this additional piece of evidence, she would have tried to move for a change of judge for cause pursuant to Rule 51 despite that Rule not being referenced in the Supreme Court rules. Upon advice of counsel, the Motion to Recuse was sought as the judicial canons clearly required recusal and there was no other evidence at the time of Judge O'Neil's personal bias.

Judge O'Neil did not have the integrity to treat Appellant with any fairness- he did not even learn how to pronounce her name. The description he gave of Appellant as a morally bankrupt person was contradicted by all of the witnesses that knew Appellant and he refused to allow countless other that would have contradicted this finding of unknown origin. This monster he and his panel portrayed does not exist nor did she exist in the 20 years of service to the State of Arizona.

In fact, the affidavit of Mark Dixon explains how the panel went out of its way to try and justify everything Gary Donahoe did, ignoring the actual hard evidence such as docket printouts, time stamps and unbelievable testimony from him.

Very telling is the finding in the panel's order that shows complete ignorance, despite Judge O'Neil having been a superior

court judge, or intentional misrepresentation as to the reasons behind a grand jury investigation and subpoena. The panel spends pages trying to claim the investigation was baseless and that the target were questionable yet ignores the very fact that this was simply the beginning of an investigation- as the United States Supreme Court has stated, summarized in Exh. 111 and discussed below.

In addition, very basic facts were falsely stated such as in the Order paragraph 393 that again finds Appellant lied because she "knew" Thomas Irvine did not represent the Superior Court but instead represented Barbara Mundell. In direct contradiction to this finding is Exh. 17 where Judge Mundell wrote in a letter "The Arizona Attorney General's Office has now assigned Mr. Irvine to represent the Court through a contract. . ." Exh. 16 email from Jessica Funkhouser "I spoke with your assistant this morning about the Superior Court's plan to award a contract to a law firm. . ."

The bias and personal dislike of Judge O'Neil and the panel is apparent through the venomous findings reflecting directly on the honesty of Appellant that are completely contradicted by the facts. Statements like the "Fake Court Tower Investigation" are demonstrative proof of what is meant by courts such as "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute ... bias or partiality ... unless they display a deep-seated favoritism or antagonism." *State v. Henry*, 189 Ariz. 542, 944 P.2d 57 (Ariz., 1997) (citing Liteky v. United States, 510 U.S. 540, 555-56, 114 S.Ct. 1147, 1157,

127 L.Ed.2d 474 (1994). *State v. Schackart*, 190 Ariz. 238, 947 P.2d 315 (Ariz., 1997). The 247 page decision is the very essence of bias and partiality given the clear deep seeded favoritism contained throughout the order as well as the denial of the stay request. In the Order, one fact actually cited that shows some "lie"- the 10.1 timing. No dispute Appellant talked to assistant, no dispute there was a pending motion to remove him aside from 10.1- two years later, mistake as to timing- reasons all articulated when fresh in Response to Special Action petition. So ironic is that panel found a "conspiracy" because law enforcement met to discuss whether to charge a crime and panel felt not sufficient evidence despite NO evidence the parties believed it was false yet appellant is a liar.

**D. Failure to inform of charges.** To this day, Appellant does not understand the charges that she had a "political" motive. What is it? This charge morphed into "political" meaning a motive to embarrass or harass a person and was allowed to proceed without allowing Appellant the opportunity to present all of the information that she had that showed her true motive was to pursue charges against those she believed committed crimes. How was Appellant supposed to anticipate that she would be found to have committed unethical conduct because she was attributed motives of others? As stated above, the screening investigation failed to provide her facts upon which to respond. Likewise, the charges themselves were speculative, conclusory and not based on facts. Ironically, Appellant was charged and "convicted" of claims that she did not have sufficient evidence

to go forward on, the very sins bar counsel and the panel have committed.

**E. Failure to allow evidence of guilt.** As found in Order, Judge O'Neil refused to allow evidence of the criminal actions of Donald Stapley Jr. and Mary Rose Wilcox. He also prevented Appellant from getting into "judicial decision making" yet allowed the witnesses to testify as to what they wanted to say, precluding cross examination on the very issues Appellant alleged occurred.

**F. Hearing panel deciding matters outside evidence.** As was clear from the panel's "evidence" as to Appellant's motive that she used an out of the ordinary process to charge Gary Donahoe in order to avoid a probable cause decision, there was absolutely no evidence nor is there any basis in fact to make this finding. Judge O'Neil was clearly writing this portion of the decision based on his experience in Pinal county, not that of Maricopa County. There were also numerous other findings that were not based on the presentation of any evidence such as the criticism of using an officer to file a criminal complaint that did not do the investigation, a common, daily occurrence in Maricopa County where agencies use liaisons, and that Thomas Irvine did not represent the Maricopa County Superior Court, contradicted directly by Exh. 17.

**G. Failure to allow Character witnesses.** Appellant named over 60 character witnesses that would have testified to her honesty yet Judge O'Neil only allowed six.R.154. All character witnesses testified in the proceedings that Appellant was honest, not political and not vindictive. Despite no evidence

to the contrary, the panel made a vicious, unsupported attack on Appellant, making findings about her character despite over 20 years of exceptional service to the state of Arizona where these issues had never been claimed before.

**H. Failure to provide exculpatory evidence.** Appellant was never provided her work product despite bar counsel meeting with and obtaining documents from the Maricopa County Attorney. In fact, in the middle of the hearing, it was discovered that the Maricopa County Attorney's Office had numerous emails that they finally provided. However, Appellant had done many research memorandums and countless Westlaw research that she was never permitted to access.

Bar counsel introduced only parts of the story, failing to disclose exculpatory information for example, introduced the Petition for Stay in the Special Action filed by Gary Donahoe in this matter but failed to introduce the Response filed by Appellant that laid out her basis for the criminal charges. R. 286, 287. This is significant because the panel's Order again erroneously rests its decision on a Form IV as if that is the only basis for the probable cause determination. Not only is that simply a release questionnaire per the criminal rules, Appellant presented evidence and testified she did not rely on that but did her ethical duty of relying on the information she knew. That information was articulated clearly before this Court in the Response to the Petition for Special Action that had been filed by Gary Donahoe. Exh. 286, 287.

Additionally, despite the vile conclusions as to Appellant's ethical make-up, only one factual contradiction was

cited- the timing of the 10.1 Motion against Donahoe. The panel failed to acknowledge that there was a prior Motion to remove Gary Donahoe and the Superior Court that clearly was mixed up in terms of timing. Exh. 148 clearly shows there was a Motion to remove Gary Donahoe filed well before the criminal complaint was filed and it is much more likely a mistake as to timing was made given the earlier filing on the same issue. The panel's failure to include all of this other evidence before making such outrageous and harmful findings shows the bias and hatred.

Not only did the panel ignore this information, Judge O'Neil again failed to disclose his role in the Donahoe matters.

Daisy Flores was a "victim" with bar counsel, not Ms. Flores claiming Appellant was dishonest. However, bar counsel failed to disclose the deposition to the panel that was clearly exculpatory and obliterated the charge.

Bar counsel has the duty to do justice just as all prosecutors do. *See Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

Prosecutors are supposed to do justice, whether in the criminal arena or quasi criminal proceedings such as disciplinary matters. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *In the Matter of John Ruffalo, Jr., Petitioner*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), *Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

**II. The Panel's Order was based on erroneous legal conclusions.**

As will be further addressed in the erroneous factual findings, the following were legal findings by the panel that

are clearly erroneous. It is difficult in this matter to show what are actually legal decisions given that 99% of the disciplinary order does not address legal standards. The standard for review on these matters is *de novo.* What will be seen in a review of the disciplinary order is that there are in fact very few legal findings. There are so many commentaries based on clear hatred of the Appellant that it is difficult to even address the findings. In order to point out the false factual findings, it is important to see the mountain of legal errors made by the panel.

Other than basic ethical rule references, the first cite to any legal authority is on page 22 when the Panel misstates the decision of the Grand Jury. Exh. 162 does in fact contain instructions however, the conclusion that "end inquiry" in this situation meant there was no evidence is contrary to the other instructions contained in the same Exhibit- the grand jury did request a draft indictment which they only do if they believe there is evidence. They also were instructed to not end inquiry if they had requested a draft indictment. As also stated by Daisy Flores in her deposition, pages 202-203, it is not clear what the grand jury intended to do.

This finding also is related to a very important erroneous legal findings in Counts 31 and 32, paragraphs 490 through 495 which finds 1. The grand jury's decision precluded any consideration by any other grand jury on the matter 2. That the grand jury presentation lacked any factual or legal substance and 3. Appellant was dishonest because she failed to tell Daisy Flores the grand jury had ended inquiry and that was a unethical

omission done knowingly and intentionally. These are all erroneous ruling that go to the heart of the two counts.

There is absolutely no law that states a grand jury ending inquiry has any legal meaning. The grand jury itself also did not make this finding. The grand jury was instructed to only request a draft indictment if they believed there was evidence for the crimes. Exh. 162. They did request a draft indictment so they clearly did believe there were facts to support the charges but their deliberations were stopped by Judge O'Neil himself when he entered the stay. What the panel also fails to state is that Appellant was precluded by law, A.R.S. 13-2812 as Ms. Flores was not the assigned law enforcement agency and this was a request to see if she would take over the investigation. Factually, she was given all the information is she decided to review it.

These findings ignore the law on prosecutorial discretion and fly in the face of separation of powers. Basically, the judicial branch here is disagreeing with a charging decision. While prosecutors must follow ethical rules, that does not open the door to a court simply disagreeing with a discretionary decision absent some evidence of other misconduct that shows the charges were invalid.

The executive branch has the authority to determine what crimes to be charged. In *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) the court stated: "In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. *United States v. Goodwin*, 457 U.S. 368, 380, n. 11, 102 S.Ct. 2485, 2492, n. 11, 73

L.Ed.2d 74 (1982); accord, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980).

"[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute."

"In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion" *Bordenkircher v. Hayes*, 434 U.S.

357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). *See also Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) *State v. Prentiss*, 163 Ariz. 81, 786 P.2d 932 (Ariz., 1989); *State ex rel. Brannan v. Williams*, 171 P.3d 1248, 217 Ariz. 207 (Ariz. App., 2007, 686 P.2d 740, 141 Ariz. 217 (Ariz., 1984)

"Challenges to this discretion are only brought based on constitutional claims such as selective-prosecution claim that is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *U.S. v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996)

Other legal errors include pages 31-2 that somehow because some lawyers, ones with no more experience or expertise than others, feel a case is not a good one, that somehow binds other attorneys from disagreeing. That is in essence the "legal argument" by the panel that Mr. Thomas was bound to listen to people other than Appellant and follow their advice and that unsupported opinions about Appellant's competence must equate to a legal finding of incompetence such as in Count 17, the RICO case. Additionally, the finding of ethical "incompetence" was not based on any actual showing that the case was filed without adequate research of preparation- it was based on the panel's interpretation of the merits of the RICO filing, contrary to that of Bob Barr, R. and Appellant, Mr. Thomas, Rachel Alexander and Sheriff's office representatives.

**Counts 4, 22 and 23.** Although the above are erroneous legal conclusions, the first real legal finding related to Appellant is on page 64. As to counts 4, 22 and 23, the panel relied on

dicta in a decision that stated that a lawyer's subjective opinion could be considered but failed to acknowledge that was part of the inquiry. In this matter, the panel found Appellant violated the ethical rules by filing matters SOLELY to embarrass or burden. The failure to allow or acknowledge evidence of the evidence that went into Appellant's decision for filing the charges is clearly erroneous. In addition, the panel made an unconstitutional jump from Andrew Thomas' alleged subjective reasons to finding Appellant violated the ethical rules. The legal basis? The number of charges, without regard to the merit of the charges, the age of the charges, without regard to the fact they were just discovered, the bootstrapping that the misdemeanors were outside the statute of limitations and that the charges included perjury and forgery, without any regard to the guilt as to these charges. These reasons cannot legally support a finding that the charges were brought solely to embarrass or harass. Nor do the other facts relied on that the case was not subjected to a discretionary peer review type proceeding, especially since the County Attorney himself was involved in the matter- why would Appellant be required to seek a review by others equal to or below her? These are not legal factors to support bringing an ethical violation that something was done solely to embarrass or harass especially given the failure of Judge O'Neil to permit the evidence of guilt found over a six month period of time.

**Count 5.** As to Count 5, the legal finding is equally troubling. Appellant was attributed a personal interest because she worked for Thomas. This legal conclusion may work for a conflict

determination but it is not legally sufficient to show the state of mind requirement for an ethical violation by Appellant. If that were to occur, all prosecutor would be subject to the actions of their supervisors unethical conduct.

**Count 7.** Count 7 concludes erroneously that Appellant violated the ethical requirement of candor to a tribunal. This finding is based on a heading in a pleading. It fails to include all of the information provide to the court that explained that heading. A finding of dishonesty cannot be considered in a vacuum- the entire pleading presented to the court must be considered. Here, the panel made a finding based not on the information to the Court but on a heading only. As will be discussed below, the panel falsely found that Appellant had not given a copy of a letter to the court as they failed to acknowledge the amended Motion that contained the Exhibit and demonstrated no dishonesty occurred.

**Count 8.** Count 8 addresses conduct prejudicial to the administration of justice. The very essence of the findings by the panel are premised on Appellant attempting to learn of the judicial decision making process. The panel characterized the letters and motions as "threats" or attempts to intimidate. What they failed to acknowledge is that the requests were related to case assignments, something traditionally done by court administration, the arm of the court that Appellant initially tried to contact for information. An attorney has the right to know why the assigned judge has been replaced with a judge that is not a member of the court. Had the minute entry assigning the case to Judge Fields simply stated the Court had a

conflict, there would have been no need to pursue it. However, it did not. The panel's finding that Appellant had no right to know why an out of the ordinary assignment to a judge not employed by the court was made is not legally supported.

Also of importance here is that the panel relied on the explanation given by Judge Mundell at the disciplinary hearing- that explanation was not given before. It was also directly contradicted by Judge Baca continuing to hear and rule on the motions filed by the defendant Staplay to remove Appellant from the prosecution. If the court assigned Judge Fields to the case due to a conflict, it should have stated that and Judge Baca should never have been involved in the subsequent hearings.

**Counts 9-10.** Counts 9 and 10 deal with statute of limitations allegations. Aside from the clearly erroneous factual findings as stated below, this Count cannot be substantiated on any legal basis. The count is based on Appellant filing misdemeanors (there is no dispute the felonies, much more serious matters, were valid) **knowing** the statute of limitations had run. There was no legal determination prior to the filing or subsequent to it that the statute of limitations had actually expired. In fact, the findings that it did were not legally addressed before making the finding in this matter that they did.

For a prosecutor to be charged with knowingly filing a case past the statute of limitations when the issue itself is a factual one requiring a judicial analysis and required to be raised by the defendant, should not be allowed. It is not an element of the offense.

The body of law on statute of limitations is clear. The statute of limitations is an affirmative defense that is waived if it is not raised at trial, so Hickey forfeited this argument. *See United States v. LeMaux,* 994 F.2d 684, 689 (9th Cir.1993)."

"In short, although Arizona cases have characterized a criminal statute of limitation as "jurisdictional," it is distinctly different from the type of territorial jurisdiction addressed in Willoughby. In our view, therefore, Willoughby does not mandate that the state prove beyond a reasonable doubt that the prosecution was timely commenced under § 13-107(B)." *State v. Jackson,* 208 Ariz. 56, 90 P.3d 793 (Ariz. App., 2004). Once a defendant presents reasonable evidence that a statutory period has expired, the state bears the burden of establishing by a preponderance of the evidence that it has not. *Taylor v. Cruikshank,* 148 P.3d 84, 214 Ariz. 40 (Ariz. App., 2006).

The fact that Mark Goldman may have started "an investigation" does not end the discussion contrary to the findings of the panel. In *State v. Jackson,* 208 Ariz. 56, 90 P.3d 793 (Ariz. App., 2004), the inquiry is when the authorities know or should know in the exercise of reasonable diligence that there is probable cause to believe a criminal [offense] has been committed. There was no finding made by the panel as to when probable cause existed in the Stapley case nor was there any evidence to show that simply missing an item on a disclosure form constituted probable cause.

Whether or not the statute of limitations had run, the panel also made an erroneous legal finding by finding appellant knew or should have known the statute of limitations ran and

therefore she engaged in conduct prejudicial to justice and was dishonest to a grand jury.

There is no legal basis to say that an attorney should have known something therefore she was dishonest. A person can only be dishonest if they know something is not true. This is legally impossible and violates her right to due process. Paragraph 136 shows the panel had no evidence of actual knowledge.

Additionally, the panel erred in concluding that Appellant was dishonest in not presenting the affirmative defense to the grand jury. There was no legal basis for the conclusion that she had an obligation to tell the grand jury how the investigation started. In fact, attorneys almost never present that information to a grand jury unless they ask.

The court in *Francis v. Sanders,* 215 P.3d 397, 222 Ariz. 423 (Ariz. App., 2009) held that while the State has no obligation to anticipate every defense, or to present facts and law pertaining to defenses in every case, it does have an obligation to respond in an accurate fashion to grand jurors' questions concerning defenses.

The grand jurors were aware of the dates of crime in the Stapley matter. Had they asked questions, they would have been entitled to answers but for the panel to find Appellant was dishonest because she did not tell them of a possible statute of limitations issue, particularly with no evidence that she knew it existed, is legal error.

**Counts 13-14.** Counts 13-14 dealt with the Court Tower investigation. The panel's legal conclusion was that the subpoena had no legitimate purpose in part because there was no

identified perpetrator or crime. Implicit in this finding is the clear misunderstanding of what the law is on grand jury subpoenas. The United States Supreme Court has made it clear in *United States v. Enterprises, Inc.*, 498 U.S. 292, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991) that:

> The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. "United States v. Morton Salt Co., 338 U.S. 632, 642-643, 70 S.Ct. 357, 363-364, 94 L.Ed. 401 (1950). The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Branzburg v. Hayes,* 408 U.S. 665, 701, 92 S.Ct. 2646, 2667, 33 L.Ed.2d 626 (1972), quoting *United States v. Stone,* 429 F.2d 138, 140 (CA2 1970).

The facts available to Respondents show that there was more than an adequate basis to begin a grand jury investigation to determine IF any criminal activity had occurred. The findings were based on incorrect legal precedent.

As to the conflict of interest finding, the Court ignored the holdings in *State v. Brooks*, 126 Ariz. 395, 616 P. 2d 70 (Ct. App. Div. 1, 1980) and found the "target" of the subpoena was the Board based on the testimony of some of the potential targets of the subpoena. No evidence was presented that any attorney client information was breached or that an ethical wall was violated as part of the subpoena. The subpoena can be

limited based on privileges and can be limited if overbroad. The panel's finding that a conflict of interest existed simply because the County Attorney's Office had given advice on some of the contracts is not legally sufficient for a determination of a conflict of interest.

**Counts 15-20.** Counts 15-20 address the RICO lawsuit. The panel appeared to make some legal determination that because some attorneys felt the RICO case should not be filed, that there was an ethical violation for doing so. That is not the law. Attorneys have differing opinions on the validity of cases. Particularly troubling is the seeming reliance on Phil MacDonnel, who testified contrary to Appellant's evaluations signed by him that she wasn't competent, and reliance on Ogletree Deakins and Peter Spaw, neither of which were shown to be experts by any means as to RICO law. Bar counsel's own expert stated that RICO cases are complex and often need to be amended numerous times.

The next legal error is in paragraph 228 that there was no standing or authority to bring the RICO lawsuit. *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir., 2008)makes it clear that a local government can bring a RICO suit if the entity is acting as a market participant or consumer. The RICO case clearly set out the injury being to the civil division- that was the remedy sought, money to restore the division to provide legal services to the Sheriff.

Additionally, the finding that there was no authority to bring the lawsuit is contradicted by one of the very lawsuits reference in this matter- Ex Rel. Thomas v. Daughton (*nka Romley*

v. *Daughton)*. 225 Ariz. 521, 241 P.3d 518 (Ariz. App., 2010) This matter went before the Arizona Court of Appeals and the very issue was a lawsuit against the Board for taking of the civil division. There was no finding that the County Attorney had no authority to bring the lawsuit.

As such, the Counts 15-16 finding that the RICO case was filed solely to embarrass or harass or was frivolous cannot be sustained. Appellant had the authority and standing to bring the lawsuit. She showed an injury as to the funding of the civil division and requested non-personal remedies in terms of funding for the legal services. This legally equated to a legitimate purpose for filing the lawsuit. The finding in paragraph 263 shows the oozing contempt Judge O'Neil had for Appellant- "No reasonably competent attorney could have concluded there was any good faith basis for pursing the RICO Act lawsuit." He clearly manipulated the testimony of bar counsel's expert who never said there was no valid purpose to the lawsuit. It was simply his opinion that there complaint was not legally sufficient despite his own admissions as to the complexity of the area.

The legal conclusion that the conduct of the Respondents evidence complete ignorance of what was required to plead and prosecute a RICO case is also unsupported. This court can review the RICO lawsuit de novo. When it does, it will see that the basic requirements were present and pled in the Complaint itself. A mountain of facts were listed and the legal elements were included. Simply because the panel does not agree does not make it frivolous.

**Count 18.** Count 18 was a finding of a conflict of interest. There have been numerous cases filed and courts have failed to find a conflict of interest when a prosecutor sues its "client" as evidenced by the *Romley v. Daughton*, 225 Ariz. 521, 241 P.3d 518 (Ariz. App., 2010) decision.

**Count 19.** Count 19 is completely unsupported by the law- the defendants were not sued for filing a bar complaint- that was a fact listed, not the basis of the lawsuit. There is no support to a legal finding that a fact that a frivolous lawsuit was filed cannot be listed in a lawsuit under RICO. In addition, the rule is not meant to give immunity to other conduct.

**Count 20.** Count 20 is based on a false legal premise that judges are immune from suit. The panel also concluded that the RICO case was based on the decision making of the judges. The RICO case was based on the manipulation of cases and assignments, not the substantive decisions. Judicial immunity is only absolute if the person is acting in his or her judicial capacity. CITE

**Counts 21, 29, and 31.** Counts 21, 29 and 31 required the panel to find a conflict for RICO case, Donahoe and grand jury presentation, the very same finding already made by Judge O'Neil in the underlying case- that a stay should be entered due to the likelihood of success. Appellant cited to numerous cases in her Response to the Special Action, Exh. 286. See also supplemental cases submitted to this Court in that matter that no conflict existed:

*Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20, 52, 33 S.Ct. 9, 16 (1912), *United States v. Kordel*, 397 U.S.

1, 11, 90 S.Ct. 763, 769 (1970),*Securities and Exchange Commission v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 666 (5th Cir. 1981),*Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1378 (C.A.D.C. 1980), *United States v. Cappetto*, 502 F.2d 1351, 1356-57 (7th Cir. 1974),*Babst v. Morgan Keegan & Co.*, 687 F.Supp. 255, 258 (E.D. La. 1988), A.R.S. 13-2314,*People ex. Rel. N.R.*, 139 P.3d 671, 673, 676-77 (Colorado 2006),*United States v. Wencke*, 604 F.2d 607, 611 (9th Cir. 1979), *State v. Robinson*, 179 P.3d 1254, 1259 (New Mexico 2008), *United States v. Hubbard*, 493 F.Supp. 206, 207 (Dist. of Columbia 1979), *State v. Cope*, 50 P.3d 513, 516 (Kan. App. 2002), *Millsap v. Super. Ct.*, 70 Cal.App.4th196, (Ct. App. 1999), *Resnover v. Pearson*, 754 F.Supp. 1374, 1388-89 (N.D. Ind. 1991), *State v. Boyce*, 233 N.W.2d 912, 913-14 (Neb. 1975).

**Counts 22-8**. Despite the evil conclusions contained in these counts that Appellant committed crimes, the few legal bases used are flawed. As stated earlier, there is no basis for some legal conclusion that Thomas Irvine did not represent the Maricopa County Superior Court. The citations as to the se up of the superior court in no way preclude an interpretation that Thomas Irvine represented the court- especially given that they said so! This finding that Appellant was disingenuous in making arguments about Gary Donahoe's conflict is a legal error in that it is premised on a false legal conclusion that Thomas Irvine could not have legally represented the courts.

The only legal analysis done in this section was to try and justify the conduct of Gary Donahoe. It fails. The fact remains that Thomas Irvine was representing the Maricopa County Superior Court on the building of the criminal court tower. That project was funded by Maricopa County. Gary Donahoe was sitting in judgment over a subpoena that sought records from the County as to contracts, invoices etc. that would have exposed the relationships. There is no legal basis to say Gary Donahoe did

not have a conflict of interest when presiding over that decision. The panel's legal conclusion that Thomas Irvine represented Barbara Mundell only is fatally flawed.

The panel next tries to defend Gary Donahoe by claiming a legal waiver by not appealing. This finding is incredulous- the attacks on Appellant in this disciplinary proceeding are supposed to be her unethical conduct in pursuing actions she did not believe in. There is no legal basis to claim failure to appeal impacts Appellant's belief in this action as ONE PIECE of evidence in Gary Donahoe's conduct.R. 286. 287.

The panel next concludes that somehow a release questionnaire pursuant to Form IV is binding evidence of Appellant's perjury. On what legal basis? It is unknown really because the panel based its findings on false legal premises. Particularly troubling is that Judge O'Neill was the judge assigned to the Gary Donahoe prosecution. When this Court declined to enter a stay on Judge Donahoe's Petition for Special Action, Judge O'Neill held a hearing in his courtroom in which Appellant appeared and argued against the stay. Judge O'Neill heard specific facts related to the conflict arguments as to whether or not the County Attorney's Office could prosecute Gary Donahoe and made findings that Gary Donahoe was likely to succeed in his conflict argument.

In that hearing, the transcript that is apparently not a part of the record but is an official court record, shows the issue of a preliminary hearing was discussed therefore Judge O'Neil knew that one was to be held. This illustrates some problems associated with his involvement, in the bar

disciplinary order, include that the panel found that Appellant filed a complaint that was "out of the ordinary" and done to avoid a finding of probable cause.

This Court knows that every complaint filed has to have a probable cause finding after an Initial Appearance under law and Judge O'Neill knew that finding was unsupported. He was the judge assigned to hear the preliminary hearing as to Gary Donahoe which would have proceeded had he not entered a stay. The panel did not hear any evidence about the normal practices and procedures of the process in Maricopa County and instead, made assumptions that resulted in incorrect legal conclusions. This Court can take judicial notice of the practices of the Maricopa County Attorney's office that regularly files complaints then either obtains a probable cause decision through a preliminary hearing or through an indictment. Administrative Order 2002-0029, changed the process by taking the complaints out of the magistrate courts. Rule 2.3 of the Arizona Rules of Criminal Procedure specifically authorizes a Complaint to be filed on the signature of a prosecutor without any involvement by a magistrate or other judicial officer until a preliminary hearing or grand jury. This finding that Appellant somehow tried to manipulate the system is contrary to the law and practice in Maricopa County. Further, the finding that the use of a law enforcement officer who was not familiar with the facts to physically sign and file the Complaint was somehow unethical was completely unsupported by an evidence and ignores the entire court liaison practice.

The panel's legal findings that Judge Donahoe properly followed legal procedures for assignment were also legal error. The case filed by Grand Woods on behalf of Conley Wolfswinkel, referenced in paragraph 425 of the Order, was not a Motion to Controvert a Search Warrant issued by the Superior Court. As such, there was no legal basis to claim Gary Donahoe was the assigned judge. As Exh. 286 makes clear, it was a civil filing and not assigned to Gary Donahoe but to Larry Grant. There was never any information provided to explain how Gary Donahoe picked up this case and the day after it was filed, set it for a hearing. Likewise, despite the "legal" conclusion made in paragraph 426 of the Order, there was no basis for a lower court appeal to be assigned to Judge Donahoe. In fact, he was not the assigned judge per the legal procedure followed by Maricopa County Superior Court. This argument was made in R. 286 despite the false statements in paragraph 426 that this was some "new" argument.

Another legal error that runs through these counts is that there was no "investigation." As this court knows clearly, when a crime is committed in the presence of law enforcement or law enforcement goes to a scene and determines a crime occurs, a case is charged or a person arrested then a report is put together. The Order is replete with references to some type of conspiracy or false charges because no "investigation" occurred. Those findings are error. An investigation can include all types of information. Here, it was clear that Appellant and MCSO representatives knew of Gary Donahoe's conduct in court. Appellant, Andrew Thomas, Joseph Arpaio and David Hendershott

all testified they met for over two hours to discuss all of the evidence in the Gary Donahoe matter. Andrew Thomas testified he then decided to go forward with charges. MCSO detectives were then asked to put the formal charging information and report together. This false legal conclusion that criminal charges cannot occur this way is not supported by the law. In fact, this Court can take judicial notice of every "in custody" case that goes to jail court-reports are prepared after the arrest.

Finally, the Panel fails to cite to the requirements for probable cause as articulated by the United States Supreme Court. They fail to even address the elements of the crimes charged against Gary Donahoe. Instead, they simply conclude that Appellant 'testified falsely on multiple occasions" citing her testimony that she knew there was no need for a signature line for police yet drafted a document for a signature. The panel failed to explain how this was false testimony. This court can again take judicial notice and see Appellant's testimony that this was a form created and used daily by the Maricopa County Attorney's office and despite there being a signature line, there is no legal requirement that a police officer sign it. Appellant is at a loss as to how a legal conclusion can be made that she committed perjury by testifying the signature line was not needed or that she did not know for sure if the officer would sign. It was legally irrelevant as stated above because the complaint was valid on signature of the prosecutor alone.

The legal requirements of the counts charged against Gary Donahoe are contained in the statutes cited in the Criminal Complaint, Exh. 163. The basis for the charges is set forth in

Exh. 286. As the panel failed to articulate the legal conclusion that there was no probable cause.

"Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with "`the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " Illinois v. Gates, 462 U. S. 213, 231 (1983) (quoting Brinegar v. United States, 338 U. S. 160, 176 (1949)); see United States v. Sokolow, 490 U. S. 1, 7-8 (1989). As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." Gates, supra, at 232. We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, United States v. Cortez, 449 U. S. 411, 417-418 (1981), and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found, see Brinegar, supra, at 175-176; Gates, supra, at 238., a matter generally held to be " The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause... In a similar vein, our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists ."

*Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)

Appellant and the people who made the decision had over 100 years combined of law enforcement experience. Appellant had supervised Charging and Grand Jury for five years. Also, Appellant had an expert opinion from Robert Barr as to the probable cause existing as to Gary Donohoe, illustrating that

the Supreme Court's opinion that it is based on the person's experience in law enforcement.

Beyond the actual existence of probable cause though is the correct legal analysis that Appellant KNEW there was not probable cause. The Order is void of any facts to show Appellant knew there was no probable cause. The legal conclusion that she committed perjury because she filed charges or had an officer file charges she knew were false cannot be legally sustained. The panel failed to acknowledge the legal requirement of the mens rea required by failing to articulate any evidence of knowing.

The finding of perjury and conspiracy are unbelievable. There was a completely unsupported legal basis for these charges. Appellant cannot be "convicted" (even in a disciplinary setting) of a crime without a jury trial and the right to call witnesses as to this "crime." The legal process for making the findings of criminal acts were not followed in this matter. The ethical rules are designed to deal with people who have been convicted of crimes, not a forum to convict people.

In any event, the panel failed to establish the most important legal requirement- the mens rea of knowing. That was just presumed for purposes of this hanging and this legal element cannot be presumed, especially as will be stated below, there was no evidence to support it.

**III. The Panel's factual findings were clearly erroneous.**

In Order to support the factual findings, this Court must fine that the panel's findings were supported by clear and convincing evidence. They were not. Arizona has adopted a definition of "clear and convincing" that requires the Panel to "be persuaded that the truth of the contention is 'highly probable.'" *In re Neville*, 147 Ariz. 106, 111, 708 P.2d 1297 (quoting *In re Weiner*, 120 Ariz. 349, 353, 586 P.2d 194, 198 (1978) and McCormick on Evidence § 340(b) (2d ed. 1972). This standard requires that the evidence in the case be clear, such that every piece of the picture comes into focus for the Panel.

Here, a finding of unethical and professional misconduct would certainly tarnish Lisa Aubuchon's reputation, and her livelihood could be taken away. Accordingly, the Court must be persuaded that clear and convincing evidence existed that Lisa Aubuchon committed unethical and professional misconduct before it allows the sanctions imposed, as the result will surely tarnish her reputation and may take away her opportunity to earn a livelihood. *In re Pappas*, 159 Ariz. 516, 518, 768 P.2d 1161, 1163 (1988).

The bootstrapping of the conclusions should not be looked at in a vacuum- the basis for their finding must be considered.

The Order issued by the disciplinary panel in the Stay denial and in the underlying disciplinary decision is so flawed with legal, factual and ethical errors that it cannot possibly be accepted. In the Order denying the Stay, the panel stated the following showed Appellant was a danger to the community: "extensive pattern of unethical conduct," "breaches of ethics

that apply in public and private practice putting the public and profession at risk," "fundamental disregard of the rules and law," deceitfulness in the manner in which Respondent sacrificed a law enforcement officer in her effort to cover her tracks as the co-author," "failed in the most fundamental way, multiple moral challenges. The more the arguments lacked evidence, the more sophisticated her rationalization became," and " the surface reasons were not difficult to identify and included intent to harass."

This Court must look closely at the clearly poisonous decisions by the panel. If they were true, how could Appellant have possibly served the State of Arizona for over 20 years, with 20 years being in a government employment as a lawyer, without ever having any discipline or even formal complaints filed, having exceptional evaluations, being promoted by three elected officials and never having a case overturned on appeal? How did all of her character witnesses testify about her truthfulness, competency and work ethic, uncontradicted by anyone who knew her work. The only witness that testified she was not competent was Phil MacDonnell whose testimony is directly contradicted not only by Andrew Thomas but by Sally Wells, her twenty years of employment history and her three promotions under three elected officials. No none testified she was ever dishonest, an opinion given only by two detectives who never worked with Appellant about what they thought she wanted them to do.

**COUNT 4.**

The Order finds Lisa Aubuchon violated ER 4.4(a) because she had no substantial purpose other than to embarrass, delay, or burden any other person. Judge O'Neil precluded evidence of Stapley and Wilcox's guilt. The basis of these counts is that they were done to further Thomas' personal and political interests, and to retaliate against and harm Stapley and Wilcox.

These findings show charges being held out against Respondent Aubuchon but when examined in detail the elements charged are really simply allegations against Thomas. There is not any specific charge or credible evidence that was presented against Aubuchon that would support the allegations of retaliation or harm by her. There is not any credible evidence to support the charges, and elements thereof, against Aubuchon, on the Claim dealing with: "…no substantial purpose other than to embarrass…" The Grand Jury indicted Stapley and Wilcox, unanimously, each twice. The evidence against both, if allowed, as found by the grand juries, supports several felony charges. There were no witnesses or exhibits that support the allegations against Appellant that she used means that had no substantial purpose other than to embarrass.

There was no evidence presented to the Panel that even suggested a political or personal interest of Appellant in the prosecution of Stapley. She was not involved in politics and she did not know Stapley before the charges. In reference to the statute of limitations she did not have any evidence prior to May 2008 that Stapley had violations of the financial disclosure requirements. The factual and legal allegations in Counts 4 and 21-23 are not sufficient to support a conviction by

clear and convincing evidence. In addition, to say the sheer number of counts and age of the counts is not in any way evidence of bias when the court precluded Appellant from introducing proof of what was discovered over a six month investigation.

As to the issues on the RICO filing being "personal," those matters are addressed in the legal error section above. Even if found to be a conflict, there is no evidence so support any finding that Appellant knew there was a conflict of interest in proceeding and in fact, the evidence shows the RICO case was given to Rachel Alexander specifically to avoid any conflict in the discovery phases.

**COUNT 5, 14 and 21-23**

Claim 5 finds a violation of ER 1.7(a)(1) and ER 1.7(a)(2) because she sought an indictment of Mr. Stapley for committing financial disclosure crimes at the same time they represented the Board of Supervisors, and because Andrew Thomas had a political and personal conflict with Supervisor Stapley. Even Judge Kenneth Fields made the finding that there was no conflict of interest. Exh. 104. Counts 14 and 21-3 have the same theory, that there were conflicts of interest due to other office representation or filings.

The Maricopa County Attorney's statutory designation as attorney for the Board of Supervisors did not, as a matter of law, mean that the County Attorney represented Mr. Stapley, or any individual member of the Board. *State v. Brooks*, 126 Ariz. 395, 616 P. 2d 70 (Ct. App. Div. 1, 1980). Claim 5 also fails

to allege any facts, even assuming *arguendo* that Andrew Thomas had a political or personal conflict with Mr. Stapley, that would show how that conflict would be, could be, or was imputed to Lisa Aubuchon, and no such facts have been proven during the Disciplinary Hearings.

Additionally, the Counts 14 and 21-23 are premised on findings of office conflicts of interest. There is no showing Appellant was involved in these cases and even if there is some conflict imputed to the office, that should not result in clear and convincing evidence that Appellant knowingly proceeded despite a conflict of interest.

**COUNT 7:**

The Order found appellant violated ER 3.3(a) by filing a motion in Superior Court stating that Judge Kenneth Fields had filed a bar complaint against Andrew Thomas, knowing that the complaint was filed against attorney Dennis Wilenchik and not Andrew Thomas as a matter of law and as a matter of fact. Count 7 is false, in fact.

In her two Motions to disqualify Judge Fields, Exh. 27 and the second being the Motion to Reconsider and Amended Motion that somehow bar counsel refused to present, Lisa Aubuchon further proved that Judge Fields did, in fact, write a letter to the State Bar of Arizona asking the Bar to investigate Dennis Wilenchik's actions on behalf of the Maricopa County Attorney's office as a basis for discipline by the bar, the letter plus the New Times Article were both attached to the pleading filed from which Count 7 arose, the State Bar of Arizona reviewed the letter from Judge Fields and initiated a bar complaint against

both Andrew Thomas and Dennis Wilenchik, the State Bar advised Thomas that they were opening a bar complaint against him, and Judge Fields' letter is the complaint to which she was referring in the motion described in the complaint.

In the Motion the panel found to be dishonest, Exh. 27, this Court can see on its face that the Motion explained exactly what transpired. The Order basically goes off the heading and fails to acknowledge that the exact course of events were spelled out for the Court. The petty, obnoxious comment in the Order that the failure to attach the letter was "suspicious" is outrageous and again indicative of the false and prejudicial findings made by the panel. The letter on its face proves what Appellant said it did- Exh. 310 and the panel failed to acknowledge that the second Motion, to reconsider Judge Baca's conflict ridden denial of the Motion, contained the letter.

**COUNT 8**

The Order finds Appellant violated ER 8.4(d) because she wrote letters to two judges of the Superior Court, for the purpose of gathering facts relative to a motion to recuse a third judge in a matter in which neither of the first two judges was presiding. The letter did not ask for the operation of the mind of the Judges and simply asked for an interview to gather facts. The Order ignores the facts as known to Appellant at that time, namely that the Motion assigning Judge Fields did not give a reason, the docket continued to show another judge assigned and Judge Fields was not a regular judge in the Maricopa County Superior Court. Appellant was also aware of public criticism of Andrew Thomas by this judge in several arenas.

The factual findings that Appellant had no right to question an administrative assignment are clearly erroneous.

Appellant has a right under the First Amendment to question a court about an administrative assignment made out of the ordinary when she is not asking for the substance of a judicial ruling impacting the merits of a criminal case. To say so otherwise also violates Equal Protection as numerous lawyers contact judges daily to find out information about scheduling, rulings being brought forth and clearly Judge Donahoe's office had some communication with Grand Woods when the Conley Woflswinkel filed his case given the one day turn around for a brand new civil filing.

**COUNTS 9 and 10**

These counts find unethical conduct based on Appellant violating ER 8.4(d) by filing misdemeanor charges against Donald Stapley knowing that the statute of limitations for charging the crimes had run before the complaint was filed. In this case, there is no evidence that filing misdemeanor counts that are allegedly past the statute of limitations had no substantial purpose other than to embarrass, delay or burden Stapley when the grand jury indicted on **50 felony counts** and the trial court refused to remand the matter. There also is no basis to claim that filing a case past the statute of limitations is obtaining evidence that violates the rights of a party.

What was lost on the panel was that most of the disclosure forms were not even obtained until 2008 therefore it contradicts the argument that the statute of limitations had definitely ran in mid 2008 as there was no way to know what was or was not

disclosed on them. Whether the existence of some of the disclosure forms should have triggered the statute of limitations in 2007 is purely speculative. There was also no evidence Appellant knew of any prior investigation into financial disclosure issues.

These counts illustrate the huge leaps the panel made with no evidence to show Appellant is evil. There was no evidence presented to show she knew. In fact, using common sense, why would she bother with misdemeanors she knew were at issue when she had 50 felonies? The panel based its decision on speculation, even stating in the decision she knew or SHOULD HAVE KNOWN, paragraph 136. The panel relies on a notebook and Appellant's admission that she knew Mark Goldman had run off documents in 2007. However, Goldman and Appellant's testimony were clear- those documents were printed off for an entirely different investigation. Appellant testified Thomas told her he didn't know if there were errors or a crime and asked her to look into it.

There was no evidence from any witness that Appellant was aware of a meeting at MACE in 2007 that allegedly discussed these counts. In fact, there was no evidence that when MCSO employees asked Appellant about potential statute of limitations problems that they ever told her about a prior investigation. The panel's leap is partially based on some notion that Appellant directed them to hide the "prior investigation" yet the police report, Exh. 304, on its face states "On May 14, 2008, at 1300 hours, a meeting with the Maricopa County

Attorney's Office was attended by investigators with the Maricopa County Sheriff's Office. It was learned that. . . ."

It is clear from the plain reading of the report that information was given to MCSO by the County Attorney's Office. If information was given then it must have been brought to them by the County Attorney's Office. This is proof that there was no intent to somehow hide how the investigation started- all anyone had to do was ask what was brought to them.

Also the panel somehow makes some conclusion that Appellant drafting an indictment was somehow indicative of wrongdoing. However, this was clearly a draft as evidenced by the fact that nothing was taken before the grand jury until five more months of investigation ensued and the final product was much different. Compare Exh. 36 with Exh. 30, page 56.

Appellant cannot possibly be found to have been dishonest with the grand jury because she "should have known" the statute of limitations may have expired.

**COUNT 13**

This Count finds Appellant violated ER 4.4(a) by requesting Grand Jury subpoenas and public records from Maricopa County employees to investigate misuse of public funds in connection with construction of the $380 million dollar Court Tower project.

This count completely ignores the facts that Appellant knew of and the case law on the basis for a grand jury investigation as cited above.

The subpoena on its face was not broad and overreaching, what the subpoena requested were common items requested in most

subpoenas and sought records relating to this $350 million public expenditure.

No facts concerning any of these above claims were alleged or presented during the hearing. This charge should be summarily dismissed because it is so vague and so lacking in facts that it does not pass the burden of proof test and it failed to give reasonable notice of the charge alleged, thereby denying Appellant due process of law.

There was no evidence that this investigation into POSSIBLE misuse of public funds violated any law. The panel failed to understand the purpose of grand jury investigations and Appellant had more than sufficient evidence given the amount of the expenditure during tough economic times, the role of Thomas Irvine, the complaints from the Treasurer and the information from MCSO that Judge Mundell was told to hire Thomas Irvine by Don Stapley.

In fact, subsequent investigation done internally has revealed numerous improprieties by County officials.R. 418.

**COUNTS 15-20**

These counts are all based on a later determination that the RICO case was not valid, factually or legally. Count 15 that Appellant violated ER 4.4(a) by filing and continuing the RICO matter against the Board of Supervisors and its elected members, judges, county officials, and private individuals for no substantial purpose other than to embarrass, delay or burden the named defendants. No such evidence was presented. The only evidence presented was that Appellant was asked by Thomas to look into it and spent a month researching and drafting. A review of the RICO Complaint on its face will show this Court that the numerous facts alleged supported the basis of the crimes alleged and importantly that the RICO elements were pled in the Complaint, despite the findings to the contrary.

In Count 16, a finding was made that the pleading was frivolous.

No evidence exists to support this finding. The RICO complaint on its face shows a valid argument to get funding back for the legal services to the Sheriff's office. This purpose was completely ignored in the analysis and the panel's finding that that was precluded is untrue as cited above in the legal analysis.

Count 17 finds Appellant incompetent. That finding is directly contradicted by Appellant's character witnesses, her evaluations and promotions over the years and the RICO complaint itself. The bar's expert admitted this as a

complex area of the law. Appellant spent a month researching and preparing legal memorandum that Maricopa County and the bar counsel refused to provide to show her competence.

Count 18 is proven erroneous by the decision in Romley v. Daughton, *supra*. A County Attorney can clearly file charges in court to address injustices in the office.

Count 19 also is clearly erroneous in that the finding was that the RICO complaint was not premised on the filing of a bar complaint. A simple review of the RCO case shows only that this was a FACT stated in the complaint- the complaint was not based on the filing of the bar complaint itself.

Count 20 is based on the false legal conclusion that judges were immune.

Appellant's participation in the RICO complaint did not occur in a vacuum. Rather, her work was preceded by *three years* of events that provide critical context for the drafting of the complaint in November 2009. Specifically, by the time the RICO complaint was drafted, Lisa Aubuchon had learned of many interconnected matters that gave rise to a very strong inference that public corruption was running wide and deep in Maricopa County government.

Once the case was assigned, Lisa Aubuchon did what any lawyer asked to draft a complaint would typically do. She gathered the facts—many of which were already at her disposal

because she knew of or had been involved in the matters described above. She did legal research—finding and reading cases that specify the elements of RICO causes of action and the pleading requirements of RICO claims. She consulted with colleagues who had also been asked to participate in the drafting process. She wrote, edited, finalized, and filed the complaint.

The record in this case contains not a shred of evidence to support a conclusion that Lisa Aubuchon had a political motive for participating in the filing or prosecution of the RICO case. The record contains not a shred of evidence to support a conclusion that Lisa Aubuchon had personal animosity toward any of the defendants in the RICO case. The record contains not a shred of evidence to support a conclusion that Lisa Aubuchon was attempting to embarrass or burden or delay any of the defendants by filing the RICO case, save for whatever burden is part and parcel of every lawsuit that is filed.

The record in this case contains not a shred of evidence to support a conclusion that Lisa Aubuchon had a political motive for participating in the prosecution of Donald Stapley or Mary Rose Wilcox. The record contains not a shred of evidence to support a conclusion that Lisa Aubuchon had personal animosity toward Stapley or Wilcox. The record contains not a shred of evidence to support a conclusion that Lisa Aubuchon was attempting to embarrass or burden or delay Stapley or Wilcox.

**COUNTS 24-30.**

These counts all begin with the same question—whether there was probable cause to believe that Gary Donahoe had engaged in

an obstruction of justice when he agreed to hear a request by Thomas Irvine that he enjoin all investigation and prosecution by the Maricopa County Attorney's Office.

The evidence shows: (1) the Maricopa County Attorney's Office had been investigating, and had substantial information from reliable sources, that public funds were being misused in the Court Tower project, (2) Thomas Irvine was one of the individuals who had received very substantial amounts of money from Maricopa County in connection with the Court Tower project, (3) Thomas Irvine had worked with Superior Court Judges, including Gary Donahoe, on the Court Tower project, (4) the Maricopa County Attorney's Office and the Maricopa County Sheriff's office made numerous attempts to obtain public records concerning moneys paid to Thomas Irvine and others from Maricopa County administrators known to have possession of such records, (5) all such public records requests were refused, in violation of public records laws, (6) the Maricopa County Attorney's Office obtained grand jury subpoenas to obtain the public records, (7) in response to the subpoenas and requests for public records, Maricopa County administrators hired Thomas Irvine to take legal action to prevent the collection of public records, (8) without commencing an action in the office of the Clerk of the Superior Court, which is the only legally-proper method of bringing a matter before the Superior Court, and without giving notice to the County Attorney or any other person or agency, Thomas Irvine delivered a motion to Judge Gary Donahoe requesting that the Maricopa County Attorney's Office be barred and prohibited from conducting any further investigation

into any of the matters that the County Attorney was required by law to investigate, (9) without contacting or giving notice to the Maricopa County Attorney, Judge Gary Donahoe signed the order presented by Thomas Irvine, quashing the Grand Jury subpoenas and enjoining further investigation by the County Attorney, (10) the order was entered in a case in which no case number had been assigned, and (11) in the opinion of a well-qualified expert witness, Judge Gary Donahoe's conduct as described above was well outside the ordinary and accepted course of judicial business and gave rise to probable cause that the crime of obstruction of justice had been committed. Moreover, even if, in retrospect, there was no probable cause to believe that a crime had been committed, she did not then know that no probable cause existed. Therefore, none of the alleged violations has merit.

There was no evidence presented that Appellant KNEW that there were no facts to support the finding of probable cause; she testified very clearly that she did know facts—and believed them to be true—that there were facts to support a finding of probable cause.

Further, Ms. Aubuchon's boss—County Attorney Andrew Thomas, the Maricopa County Sheriff of 30 years, Joe Arpaio, and his Chief Deputy David Hendershott all believed that probable cause existed to charge Gary Donahoe.

**COUNT 32.**

The Order finds Appellant violated E.R. 8.4(c) because Lisa Aubuchon informed Daisy Flores that a grand jury proceeding had taken place, but did not inform her about what the grand jury

had voted.

While Appellant asked Daisy Flores to review an investigation, she made it clear that it had been presented to a grand jury, even giving her the grand jury number and telling her IF she accepted the investigation, she would need to review that information. As she had failed to agree to accept the investigation, Arizona law prohibited Appellant from disclosing the results. A.R.S. §13-2812.

As further evidence of the flawed reasoning of the panel on this issue, the panel found that the grand jury's decision precluded any further investigation Not only is there no law to support a conclusion that an "end inquiry" has any preclusive effect whatsoever, the reasons for the end inquiry are not conclusively stated. Daisy Flores, the person that Appellant was allegedly dishonest to, reviewed the instructions along with what the grand jury did and in her deposition she said she did not think it was clear what the grand jury intended to do and that she does not agree with allegations that they found no evidence or intended to stop the investigation. She even stated she told the bar counsel this was a "weak" claim. Deposition of Daisy Flores.

**COUNT 33.**

Appellant attempted to cooperate by asking for facts to respond to and actually responding the best she could. She should not be charged with unethical conduct because she sought out review of the actions of an out of state bar counsel after

consulting with counsel. She did in fact respond factually to many of the allegations.

**SANCTIONS**

The sanction of disbarment should not stand. Based on the foregoing violations of her constitutional rights and the erroneous legal and factual findings, this matter should be overturned. If any findings are allowed to stand, Appellant should be judged by her actions and her history in determining sanctions. Appellant was prohibited from presenting the 60 plus character witnesses she named, this is the first Complaint that went past the screening stage and there really is no bar complaint that even exists.R.154. A new hearing on sanctions should be held if this Court affirms any findings.

**CONCLUSION**

This matter should be reversed and remanded for a new determination of probable cause under the new disciplinary system or a full procedure under the old system. The blatant constitutional violations that have occurred in the process that led to Appellant's disbarment should not be sanctioned by this Court. Appellant is entitled to a fair trial based on procedures all attorneys are subjected to, not a manipulated process. She should be judged on her actions, not those of others and she should not be subjected to huge leaps to get to decisions that are the death penalty for a 22 year attorney with

an excellent history serving Arizona and no prior disciplinary history.

Respectfully submitted this 18th day of June, 2012.

Lisa M. Aubuchon

Original filed this 18th day
Of June, 2012.

Copies electronically mailed this 18th day of June to:

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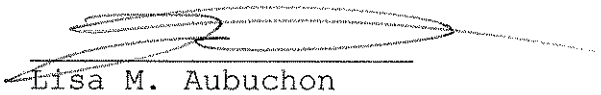
**CERTIFICATE OF COMPLIANCE**

Pursuant to Arizona Rules of Appellate Procedure that this brief is monospaced typefaced and is exceed 60 pages exclusive of Table of Contents, Citations and signatures.



Lisa M. Aubuchon